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No.99-1935

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

COLUMBUS-AMERICA DISCOVERY GROUP, INC.
Petitioner,

v.

ATLANTIC MUTUAL INSURANCE COMPANY, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE NATIONAL MARITIME HISTORICAL SOCIETY IN SUPPORT OF PETITIONER

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23pp

The National Maritime Historical Society hereby moves, pursuant to Rule 37.2 of the Rules of this Court, for leave to file the attached brief as *amicus curiae*. Counsel for the petitioner has consented to the filing of this brief; counsel for the respondents have refused consent.

The National Maritime Historical Society was founded in 1963 and currently has more than 12,500 members.

The objective of the National Maritime Historical Society is to educate and challenge people by increasing their awareness and appreciation of our maritime heritage. The Society believes that understanding our past, including our maritime history, is vital to meeting the problems of the present and preparing for the challenges of the future.

The Society publishes *Sea History* magazine, the *International Register of Historic Ships* and its *Guide to American and Canadian Maritime Museums*. The Society initiated and secured the adoption of the Maritime Heritage Act of 1979, which allocated $5 million for historic ships, monuments and programs. NMHS has lent its influence and experience to the preservation of numerous individual ships, such as the bark *Elissa* (1877), now at Texas Seaport in Galveston, and the schooner *Ernestinea* (1894), now in New Bedford, Massachusetts, and the Liberty Ship *John W. Brown*, now sailing out of Baltimore. Current efforts spearheaded by NMHS include Project Experiment, the plan to build a replica of the Hudson River sloop, *Experiment*, that sailed to China in 1785, and a unique public/private partnership to save the *Wapama*, the last Pacific steam schooner.

In an effort to acquaint America's young people with the maritime heritage it is so diligently working to preserve, NMHS is active in several education projects. With Walter Cronkite, we launched the Maritime Education Initiative, developing case histories of successful educational programs in this field. NMHS also sponsors specific programs, including a Summer Sail Training Program for students on the frigate *Rose* and a boat building/rowing program at Nyack, New York. Our members have influenced such projects as the raising of money to help send the Liberty ship *Jeremiah O'Brien* to Normandy for the 50th anniversary of D-Day.

The Society is vitally concerned about the destructive impact that the decision below will have upon the preservation of our maritime history. Conservation of our country's historical and cultural heritage is vital not only for the current generations of Americans, but for future generations, as well. Because America is a melting pot of many cultures, its history is particularly diverse and serves as one of our common links to the past.

The conflict among the circuits over the admiralty law standard for abandonment hampers the protection and preservation of our maritime heritage. In practical effect, the circuit conflict not only undermines the Abandoned Shipwreck Act of 1987 but also hampers the exploration and preservation of historic shipwrecks in international waters. If, as the Fourth Circuit held below, abandonment cannot be inferred as a fact from circumstantial evidence, we risk losing forever a window into the past and the opportunity to study and share our rich cultural heritage. The express abandonment standard encourages concealment, and perhaps

outright destruction, of historical information by explorers of long-lost shipwrecks. Much of this information is irreplaceable, and could well be lost to all generations to come.

For these reasons, the Court should grant this motion for leave to file the attached brief *amicus curiae* in support of the petitioner.

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July 1, 2000

QUESTION PRESENTED

Should the Court resolve the conflict among the circuits concerning the admiralty law test for the abandonment of property long-lost at sea?

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BRIEF OF THE NATIONAL MARITIME HISTORICAL SOCIETY AS AMICUS CURIAE IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST

The National Maritime Historical Society was founded in 1963 and currently has more than 12,500 members.

The objective of the National Maritime Historical Society is to educate and challenge people by increasing their awareness and appreciation of our maritime heritage.[1] The Society believes that understanding our past, including our maritime history, is vital to meeting the problems of the present and preparing for the challenges of the future.

The Society is vitally concerned about the destructive impact that the decision below will have upon the preservation of our maritime history. Conservation of our country's historical and cultural heritage is vital not only for the current generations of Americans, but for future generations, as well. Because America is a melting pot of many cultures, its history is particularly diverse and serves as one of our common links to the past.

The Society publishes *Sea History* magazine, the *International Register of Historic Ships* and its *Guide to American and Canadian Maritime Museums*. The Society initiated and secured the adoption of the Maritime Heritage Act of 1979, which allocated $5 million for historic ships, monuments and programs. NMHS has lent its influence and experience to the preservation of numerous individual ships, such as the bark *Elissa* (1877), now at Texas Seaport in Galveston, and the schooner *Ernestinea* (1894), now in New Bedford, Massachusetts, and the Liberty Ship *John W. Brown*, now sailing out of Baltimore. Current efforts

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[1] Pursuant to Rule 37.6, the National Maritime Historical Society notes that counsel for Petitioner assisted in the drafting of this Brief by providing an update on the status of the proceedings and recent case law on abandonment, docketing information and a service list, and that Petitioner has assisted in the service and copying of this Brief.

spearheaded by NMHS include Project Experiment, the plan to build a replica of the Hudson River sloop, *Experiment*, that sailed to China in 1785, and a unique public/private partnership to save the *Wapama*, the last Pacific steam schooner.

In an effort to acquaint America's young people with the maritime heritage it is so diligently working to preserve, NMHS is active in several education projects. With Walter Cronkite, we launched the Maritime Education Initiative, developing case histories of successful educational programs in this field. NMHS also sponsors specific programs, including a Summer Sail Training Program for students on the frigate *Rose* and a boat building/rowing program at Nyack, New York. Our members have influenced such projects as the raising of money to help send the Liberty ship *Jeremiah O'Brien* to Normandy for the 50th anniversary of D-Day.

The Society is vitally concerned about the destructive impact that the decision below will have upon the preservation of our maritime history. Conservation of our country's historical and cultural heritage is vital not only for the current generations of Americans, but for future generations, as well. Because America is a melting pot of many cultures, its history is particularly diverse and serves as one of our common links to the past.

The conflict among the circuits over the admiralty law standard for abandonment hampers the protection and preservation of our maritime heritage. In practical effect, the circuit conflict not only undermines the Abandoned Shipwreck Act of 1987 but also hampers the exploration and preservation of historic shipwrecks in international waters.

If, as the Fourth Circuit held below, abandonment cannot be inferred as a fact from circumstantial evidence, we risk losing forever a window into the past and the opportunity to study and share our rich cultural heritage. The express abandonment standard encourages concealment, and perhaps outright destruction, of historical information by finders of long-lost shipwrecks. Much of this information is irreplaceable, and could well be lost to all generations to come.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT AMONG THE CIRCUITS ON THE ADMIRALTY LAW STANDARD FOR ABANDONMENT

The circuit conflict over the admiralty law standard for abandonment is a major impediment to the protection of our national maritime heritage. The academic community, both at national law schools and in departments of history and archaeology, have time and again recognized the unfortunate effects of the conflict among the circuits on the protection and conservation of shipwrecks of historic and/or archaeological value. Moreover, conflicts over the definition of abandonment, presumptions and burdens of proof have undermined the ability of courts to implement Congressional legislation in the Abandoned Shipwreck Act of 1987, together with historic protection outside state waters. *See e.g. Jones, The United States Supreme Court and Treasure Salvage: Issues Remaining After Brother Jonathan,* 30 J. Mar. L & Comm. 205, 213-220 (1999).

The circuit courts have diplomatically entreated the Court for its guidance in resolving the conflict. *Compare Columbus-America Discovery Group v. Atlantic Mutual Insurance Company*, 203 F.3d 291 (4th Cir. 2000) *with Deep Sea Research, Inc. v. The Brother Jonathan*, et al., 102 F.3d 379, 387-88 (9th Cir. 1996), *aff'd in part, vacated in part on other grounds, and remanded sub nom. California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998) *and Fairport International Exploration, Inc. v. The Shipwrecked Vessel Known as the Captain Lawrence, et al.*, 105 F.3d 1078, 1084 (6th Cir. 1997), *vacated and remanded on other grounds*, 523 U.S. 1091 (1998) *and Columbus-America v. Atlantic Mutual*, 974 F.2d at 450, 472 (4th Cir. 1992) (Widener, J., dissenting).

The issue of abandonment has been central in virtually every major historic shipwreck case over the past two decades, and the division among the circuits is currently at it widest, ever. Over the past nine years, the circuits have exhibited confusion over the applicable standard, openly acknowledging that they are in conflict. Cases which turn on the admiralty law standard for abandonment are pending on the dockets of district courts all over the nation, and in the Fourth, Sixth, Ninth and Eleventh Circuits. Following the Court's decision in *California v. Deep Sea Research*, the division among the circuits has been expanding, and only the Court's attention can resolve the conflict.

The decision below reflects the most extreme—and in its harmful effects on historic shipwreck preservation, the most hostile—statement of the law of abandonment. While the circuit standards for abandonment are arrayed across a broad spectrum of views, at the opposite end of the spectrum from

the First, Fifth and Eleventh Circuits is the Fourth Circuit rule: where an owner asserts a claim title, there must be clear and convincing evidence of an express, affirmative abandonment. *Columbus-America Discovery Group v. Atlantic Mutual Insurance Company*, 974 F.2d. at 464-65; *Sea Hunt v. The Unidentified, Shipwrecked Vessel or Vessels, etc.*, 47 F. Supp. 2d 678 (E.D. Va. 1999). In the Fourth Circuit, where a person claiming ownership appears and asserts a claim, there can be no inference of abandonment. Instead, abandonment requires "an owner's express declaration abandoning title." *Sea Hunt*, 47 F. Supp. 2d at 687, *quoting Columbus-America v. Atlantic Mutual*, 974 F.2d. 450, 464-65 (4th Cir. 1992), *cert. denied*, 507 U.S. 1000 (1993). A finding of abandonment can occur in only "two categories" of cases—either where owners "expressly and publicly abandoned their property" or where "no owner appears." *Compare Columbus-America Discovery Group v. Atlantic Mutual Insurance Company*, 974 F.2d. at 461, 464, 465; *Sea Hunt*, 47 F. Supp. at 687. In other words, in the Fourth Circuit, the standard for abandonment is the same for private and public vessels: express abandonment. *Sea Hunt*, 47 F. Supp at 688.

Since such an express declaration will never occur in the case of valuables, no abandonment will apply in any case where an alleged owner asserts a claim. The express abandonment approach discourages the search for and recovery of historic shipwrecks.

II. THE COURT SHOULD GRANT CERTIORARI BECAUSE CONSERVATION OF OUR NATION'S HISTORICAL AND CULTURAL HERITAGE, ENCOMPASSED IN THE ADMIRALTY LAW STANDARD FOR ABANDONMENT, IS AN IMPORTANT NATIONAL QUESTION

A. Congress and the President Have Expressed the National Policy of Conserving Historical and Cultural Materials, Including Abandoned Shipwrecks and Sunken Cultural Deposits

Conservation of our country's historical and cultural heritage is vital not only for the current generations of Americans, but also for future generations. Because America is a melting pot of many cultures, its history is particularly diverse and serves as one of our common links to the past.

Because of the importance of preserving our country's rich cultural and historical heritage, Congress passed the National Historic Preservation Act, 16 U.S.C. Sec. 470 et seq., in 1966. The Act establishes the policy of the United States of supporting the preservation of historical resources through a cooperative effort of federal, state and local governments, and contributing to "the preservation of non-federally owned prehistoric and historic resources and giv[ing] maximum encouragement to organizations and individuals undertaking preservation by private means." 16 U.S.C. Sec. 470-1(4). Congress' efforts to protect historic resources stem from the understanding that "preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy

benefits will be maintained and enriched for future generations of Americans." 16 U.S.C. Sec. 470(b)(4).

In 1971, President Nixon reiterated this country's commitment to preserving our historical and cultural past by issuing an executive order calling for the federal government to restore and maintain federally owned objections of historical, architectural or archaeological significance, and to ensure that federal programs contribute to the preservation of non-federally owned sites, structures and objects. Exec. Order No. 11593, 36 Fed. Reg. 8921 (1971). The Executive Order also directs the federal government to take a leadership role in maintaining our country's historical and cultural heritage to ensure its preservation for future generations. *Id.*

The national policy of protecting historical and cultural resources extends to underwater sites. For example, Congress passed, and President Reagan signed into law, the Abandoned Shipwreck Act of 1987, 43 U.S.C. § 2101-2106 because of the importance of long-lost and abandoned shipwrecks to the historical and cultural heritage of the United States. The Act recognizes the need to "allow for the public and private sector recovery of shipwreck consistent with the historical values and environmental integrity of the shipwrecks and the sites." 43 U.S.C. Sec. 2103(a). In enacting the Abandoned Shipwreck Act, Congress incorporated what seemed to be a clear standard for coverage—the admiralty law standard for abandonment. The legislature sought to end the costly litigation that had infected state management of historic shipwrecks and had caused recurring state-federal conflicts regarding jurisdiction over historic shipwrecks. S. Rep. No. 241, 100th Cong., 1st Sess. 3 (1988); 134 Cong. Rec. H1178, 1183 (Mar. 28, 1988).

This national policy of protecting long-lost and abandoned shipwrecks, and other underwater cultural deposits, has been expressed, at various times, in other forms. *See, e.g.* The Marine Sanctuaries Act, 16 U.S.C. Sec. 1431 et seq. (1988) (amended 1992) (allowing the federal government to designate areas of the marine environment as a sanctuary based, *inter alia*, on the "historical, cultural, archaeological or paleontological significance" of the site involved. 16 U.S.C. Sec. 1433 (b)(1)(B).

B. The States Have Expressed the National Policy of Conserving Historical and Cultural Materials, Including Abandoned Shipwrecks and Sunken Cultural Deposits

Even before passage of the Abandoned Shipwreck Act, most states and territories had recognized the national public policy of conserving underwater cultural resources, such as long-lost abandoned shipwrecks. In fact, 27 states had already enacted historic preservation statutes pertaining to abandoned shipwrecks or underwater historical property. H.R. Rep. No. 514(I), 100th Cong., 2d Sess., *reprinted in* 1988 U.S.C.C.A.N. 365. While these states' statutes predated the Abandoned Shipwreck Act, they were directed to similar concerns—and by and large turned on the standard for abandonment under admiralty law.

Since passage of the Act, other states have adopted statutes to protect historic shipwrecks, with "abandonment" as the key, operative standard for coverage. The goal of the state legislatures, as with the Congress, was to adopt a clear, black-letter standard so as to (1) avoid conflicts among state-federal jurisdiction; (2) allow effective management of historic

shipwrecks for purposes of historic preservation; and (3) avoid protracted, often expensive litigation over abandonment.

The Court has held that the meaning of "abandoned" under the ASA is the same as its meaning under the law of admiralty, *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 508 (1998). The circuit conflict over abandonment has, however, essentially abrogated the aims of Congress and the state legislatures. The conflict among the circuits has defeated or seriously impeded the ability of the states to manage the protection of historic shipwrecks in their waters, has generated jurisdictional conflicts between the state and federal governments, and has spawned expensive and time-consuming litigation over the admiralty law standard for abandonment—diverting resources from historic protection to lawsuits.

Like federal efforts, state programs have been directed toward responsible recovery and conservation of items from the sea. Of similar importance have been concerns over the protracted and costly litigation spawned by the existing circuit conflict and confusion over the admiralty law standard for abandonment. Yet, these same concerns are generated by the Fourth Circuit's continuing adherence to the express abandonment theory, and the conflict among the other circuits concerning presumptions and burdens of proof for a maritime abandonment.

C. The Issue of the Admiralty Law Standard for Abandonment Is Important to the National Policy of Conserving Our Historical and Cultural Heritage

The issue of when long-lost shipwrecks are effectively abandoned is a question of first impression for the Court, on

which the circuits are in conflict. Although the question of what rights accrue to a finder or salvor upon locating a shipwreck can be traced by to Rhodian and Roman maritime law, *see* M. Norris, 3A *Benedict on Admiralty: The Law of Salvage* § 1, at 4-7 (1958 & Supp. 1974), the modern development of the law and refinement of maritime technology has taken place in the post-World War II era. We are thus at the crossroads requiring the Court's attention to this case.

Determination of when a shipwreck is abandoned affects preservation both under the Abandoned Shipwreck Act and in areas not covered by the Act. If, as the Fourth Circuit has held, abandonment cannot be inferred as a fact from circumstantial evidence, we risk losing forever a window into the past and the opportunity to study and share our rich cultural heritage. Much of this information is irreplaceable, and now could be lost to all generations to come.

Accordingly, the issue affects literally millions of Americans, living and unborn, and warrants the Court's attention.

III. ADMIRALTY COURTS SHOULD BE PERMITTED TO INFER ABANDONMENT OF LONG-LOST SHIPWRECKS BASED ON CIRCUMSTANTIAL EVIDENCE

There are overwhelming policy reasons for resolving the conflict among the circuits to allow admiralty courts to infer abandonment based on circumstantial evidence. Application of the rule of inferred abandonment aids certainty and predictability of legal rights. As time passes, memories fade, claims become stale, witnesses are lost, and the chances of

mistake, or even fraud, become great. The corresponding need for repose increases. Expending resources in litigation over title, when such resources could be better spent on historic preservation and scientific study, is wasteful and will burden our court system and historical preservation efforts for years to come.

Equally important, the express abandonment standard applied by the decision below will encourage concealment, and perhaps outright destruction, of historical information by explorers of long-lost shipwrecks. The law should encourage investigation and preservation of information about historic shipwrecks, consistent with our national policy. Those who find shipwrecks should have every incentive to act openly, and to strive to determine as much as possible about the shipwrecks. The Fourth Circuit's opinion provides precisely the opposite incentive. By according a presumption of ageless vitality to ownership interests, the decision below discourages explorers from investigating conditions, items, and structures at wreck sites that may link a particular recovered artifact with a specific long-gone crew member, cargo interest, or passenger. In effect, the explorer has a disincentive to develop historical information that might shed valuable light into the provenance and history of the shipwreck.[2]

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[2] Through the use of new and sophisticated marine technologies, shipwrecks can yield information not only from their cargoes, but also from their structures and the utensils, plates, glassware, cutlery, and clothing found aboard historic shipwrecks. Geisecke, *Shipwrecks: The Past in the Present,* 15 Coastal Management 179, 180 (1987). Ironically, under the Fourth Circuit's approach, if a finder develops historical information which, even tenuously, links an artifact to a specific crew member, cargo owner, or passenger, the

The *Columbus-America* case presents squarely the admiralty law standard for abandonment. *See* Jones, *supra*. In the future, when Columbus-America asks for a declaration of title to items it recovers from the *SS Central America*, the express abandonment standard will be binding. S*ee Sea Hunt v. The Unidentified Shipwreck Vessel*, 47 F. Supp. 2d at 688. The district court's published opinion rests on clear factual findings, and its decision was reversed by the court of appeals based on a clearly-stated legal rule prohibiting a finding of

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fruit of its discovery may turn into a claim of ownership that has been stale for many generations. The contrast in conduct between the insurance companies and Columbus-America is a striking reminder of the results of applying the express abandonment standard. In contrast to Columbus-America's diligence and perseverance in the face of adversity, the insurance companies sat on the sidelines for 135 years, advanced not a penny to help find or recover the SS *Central America*, and then, after Columbus-America had taken all the risk and done all the work, asserted a claim of ownership despite acknowledging that the entire basis for their claim was, at its core, newspaper articles. In contrast to Columbus-America's professionalism, at every turn they engaged in mud-slinging, making repeated obfuscating *ad hominem* attacks on Columbus-America and finally thoroughly confusing the senior district judge, who had heard none of the evidence and had at the eleventh hour been called out of retirement after the death of the district judge who had sat on the case for the prior decade of the litigation In contrast to Columbus-America's careful, meticulous recovery methods to preserve the science and history of the SS *Central America*, they propounded "smash and grab" salvage methodology—to go in, get the gold at any cost, and in the process, destroy the shipwreck's history, science and provenance.

abandonment in any case where an owner asserts a claim, absent an express abandonment.

CONCLUSION

The Court should grant a writ of certiorari.

Respectfully submitted,

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